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Tethering the Administrative State: The Case Against *Chevron* Deference for FCC Jurisdictional Claims

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TETHERING THE ADMINISTRATIVE STATE: THE CASE AGAINST *CHEVRON* DEFERENCE FOR FCC JURISDICTIONAL CLAIMS

Daniel A. Lyons

Abstract: Like many other agencies, the Federal Communications Commission has seen significant regulatory growth under President Obama. But unlike health care, financial reform, and other areas, this growth has come without statutory guidance from Congress. The FCC's assertion of jurisdiction over broadband service is reminiscent of its earlier attempts to regulate cable and to deregulate telephone service, efforts that courts have viewed skeptically in the absence of specific statutory authorization. But this skepticism is in tension with *Chevron*, which grants agencies substantial deference to interpret ambiguities in the statutes that they administer.

This article argues that *Chevron* deference should not extend to agency jurisdictional claims, such as the FCC's claim to authority over broadband. For both constitutional and policy reasons, courts should distinguish between agency action that fills a gap in a statutory scheme and action that defines the outer boundary of that scheme. As the Commission's net neutrality project winds its way through the judicial system, courts should not allow the agency to define the limits of its own authority, and should instead search closely for a grant of authority from Congress.

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TETHERING THE ADMINISTRATIVE STATE: THE CASE AGAINST *CHEVRON* DEFERENCE FOR FCC JURISDICTIONAL CLAIMS

Daniel A. Lyons*

INTRODUCTION

Reregulation has become the predominant theme of the early Obama administration. From the financial markets¹ and consumer lending² to the health care industry,³ the President and Congress have enacted statutes designed to curb what they saw as the deregulatory excesses of the past three decades. As a result, agencies throughout Washington are preparing to assume a more active role throughout the economy, overseeing and managing various markets in accordance with the will of the political branches.

The Federal Communications Commission has seen a similar sea change in its regulation of the telecommunications industry. Since Julius Genachowski assumed the chairmanship in 2009, the number of open dockets at the Commission has ballooned to over three thousand.⁴ Among other innovations, the Commission has released an ambitious roadmap to reallocate the electromagnetic spectrum⁵ and has begun regulating services traditionally considered to be at the periphery of its authority, such as wireless data transmission.⁶ Perhaps most notably, it has fired the opening salvos in the battle for net neutrality, a high-profile, high-stakes rulemaking proceeding that would extend the Commission's jurisdiction over broadband internet transmission.⁷

But unlike its counterparts at the SEC or Health & Human Services, the FCC has begun reregulating telecommunications without a clear congressional mandate. This distinction is important, because the

* Assistant Professor of Law, Boston College Law School. Thanks to Elizabeth Foote, Dan Kanstroom, Crystal Lyons, Randolph May, Zygmunt Plater, Geoffrey Why, and Christopher Yoo for feedback and commentary, and to the Journal of Corporation Law for organizing the symposium for which this article was written.

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203 (2010).

² Credit CARD Act of 2009, Pub.L. 111-24 (2009); Student Aid and Financial Responsibility Act, Pub.L. 111-152 (2010).

³ Patient Protection and Affordable Care Act, Pub.L. 111-148 (2010); Health Care and Education Reconciliation Act of 2010, Pub.L. 111-152 (2010).

⁴ *FCC Order Would Make More Filings Available Online*, COMMUNICATIONS DAILY, Feb. 8, 2011.

⁵ See *Connecting America: The National Broadband Plan*, 2010 WL 972375 (F.C.C. March 16, 2010).

⁶ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265 (Apr. 21, 2010).

⁷ See *Preserving the Open Internet*, 2010 WL 5281676 (F.C.C. Dec. 23, 2010).

telecommunications world has changed dramatically since Congress last overhauled the Communications Act in 1996—an overhaul that was itself largely deregulatory in focus.⁸ The Act provides little support for (and is arguably hostile to) the agency’s efforts to enact comprehensive regulation beyond its traditional core of broadcasting, cable, and telephone communication. Yet undaunted by this lack of a legislative rudder, the Commission has nonetheless taken upon itself the mantle of expanding its jurisdiction and developing the next generation of American telecommunications law.⁹

The Commission’s tendency toward aggrandizement is familiar to the old war horses of past telecommunications policy battles. When cable television emerged in the 1950s, the Commission recognized that it lacked authority to regulate this new technology under the Communications Act.¹⁰ But as this new technology flourished, the Commission used its ancillary authority to heap increasingly intensive regulations upon the new industry, until the Supreme Court finally struck down certain regulations as beyond the agency’s statutory authority in 1979.¹¹ Similarly, when the Commission determined that the statutory framework governing telephones was unsuited to the competitive landscape of the late 1980s, it began to rewrite the Communications Act and guide the industry toward deregulation—only to see the court strike down its aspirations as *ultra vires*.¹² In each instance, the court curbed the Commission’s attempts to adopt a complex regulatory scheme without a clear legislative mandate, which in turn prompted Congress to provide more explicit authority to act in accordance with the will of the political branches. And thus far, it appears that the Commission’s current effort to regulate broadband will fit this pattern as well.¹³

This history, and the Commission’s current push toward reregulation, highlight an important but often ignored tension in modern administrative law. The *Chevron* doctrine generally requires courts to defer to an agency’s interpretation of ambiguous language in a statute that the agency administers.¹⁴ *Chevron* is premised on the assumption that agencies, not courts, should “fill any gap left...by Congress” in the agency’s organic

⁸ Telecommunications Act of 1996, Pub.L. 104-104.

⁹ Cf. Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1068 (1998) (“As a matter of simple practice, administrative agencies have become America’s common law courts.”).

¹⁰ *Frontier Broad. Co. v. Collier*, 24 F.C.C. 251, 253-54 (1958).

¹¹ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); see Daniel Lyons, *Technology Convergence and Federalism: Who Should Control the Future of Telecommunications Regulation?*, 43 U. MICH. J.L. REFORM 383, 391-92 (2010).

¹² *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218 (1994); *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

¹³ See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

¹⁴ *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

statute.¹⁵ But such deference is less appropriate in cases involving the agency's jurisdiction. In these cases, the agency is not merely filling a gap within a statutory framework, but is instead defining the outer limits of that framework. There is a difference in kind between the policy question "what rules should govern broadband?" and the legal question "does the Communications Act allow the Commission to make rules governing broadband?" Courts appropriately defer broadly to agency expertise when answering the former question, but should reserve the latter question to "the province...of the judicial department."¹⁶

This essay examines this distinction between policy and jurisdictional questions through the FCC's history of rulemaking at the horizon of its statutory authority. In the telecommunications context, courts have often viewed the Commission's efforts to expand its jurisdiction with skepticism, but do not often reconcile their decisions with *Chevron*'s seeming grant of near-plenary authority to agencies in such matters. For both constitutional and institutional reasons, this skepticism is well-grounded and should apply to the Commission's current efforts at reregulation. As the Commission's net neutrality project winds its way through the judicial system, courts must tread carefully but firmly, respecting the Commission's primacy in the policymaking sphere but assuring that this rulemaking remains bound within the jurisdictional confines of the Communications Act.

I. REGULATION, DEREGULATION, AND REREGULATION: THREE CASE STUDIES

A. Cable Regulation

Compared to the modern telecommunications industry, the 1934 Communications Act was elegantly simple. The Act charged the newly-created Federal Communications Commission with regulation of two primary areas of responsibility. Two-way communication by wire (telephone service) was governed by a common carriage scheme codified in Title II of the Act, while broadcast communication over radio waves was governed by a licensing system described in Title III.¹⁷ When the cable industry was born in the 1950s as a service that retransmitted broadcast

¹⁵ See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583-84 (2006) ("describing *Chevron* as a "counter-*Marbury*" for the executive branch).

¹⁶ Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁷ Communications Act of 1934, ch. 652, 48 Stat. 1064. The Act consolidated the duties formerly performed by two different federal agencies: the Federal Radio Commission, which had administered a Title III-like licensing scheme to govern radio broadcasting, and which was abolished by the 1934 Act, and the Interstate Commerce Commission, which before the 1934 Act had loosely regulated telephone companies under the Mann-Elkins Act of 1910.

television stations by wire to homes with poor over-the-air reception,¹⁸ the Commission initially disclaimed any jurisdiction: the new service did not fit neatly into either of its clearly-defined statutory mandates.¹⁹

By the 1960s, however, the Commission slowly began to regulate the cable industry using its ancillary authority under Title I. Title I operates as an FCC “necessary and proper” clause. It allows the Commission to assert limited jurisdiction over services not directly within the Commission’s purview, if (1) the service in question involves communication by radio or wire and (2) regulation of the service in question is reasonably ancillary to the Commission’s performance of its duties under the Act.²⁰ The Commission asserted that cable regulation was necessary because the cable industry was increasingly affecting broadcasters, in ways that threatened the Commission’s efforts to discharge its Title III duties.

The Court initially agreed, allowing the Commission to adopt rules limiting cable companies’ ability to rebroadcast out-of-market signals²¹ and requiring large cable companies to offer original local programming as a condition of importing these distant signals²² (though Chief Justice Burger noted in a concurrence that the latter restriction “strain[ed] the outer limits” of its jurisdiction).²³ But in *United States v. Midwest Video* (commonly called *Midwest Video II*), the Court struck regulations that would have required cable companies to dedicate certain channels to public use.²⁴ The Court explained that such regulations treated cable companies as common carriers. Title III explicitly restricted the Commission from regulating *broadcasters* as common carriers, because such access would unduly infringe upon broadcasters’ private journalistic integrity. As a result, the Court explained, the Commission could not claim that such regulation of *cable providers* was reasonably ancillary to its Title III authority over broadcast.²⁵ While the Title III prohibition did not explicitly forbid such regulation of cable companies, it reflected a policy of balancing public access against editorial discretion, with which the Commission interfered:

[W]ithout reference to the provisions of the Act directly governing broadcasting, the Commission’s [ancillary] jurisdiction...would be unbounded. Though afforded wide latitude in its supervision over communication by wire, the Commission was

¹⁸ See Lyons, *supra* note 11, at 390-91.

¹⁹ *Frontier Broad. Co. v. Collier*, 24 F.C.C. 251, 253-54 (1958) (“We do not believe that ... [cable] systems are engaged in performing the service of communications common carriers within the contemplation of the applicable provisions of the Communications Act.”).

²⁰ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

²¹ *Id.* at 177-78.

²² *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (“Midwest Video I”).

²³ *Id.* at 676 (Burger, C.J., concurring in the judgment).

²⁴ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (“Midwest Video II”).

²⁵ *Id.*

not delegated unrestrained authority...Though the lack of congressional guidance has in the past led us to defer--albeit cautiously--to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited."²⁶

Midwest Video accompanied several DC Circuit Court decisions that cast additional doubt on the Commission's cable regulations. In part because of this judicial backlash, Congress passed the 1984 Cable Act, which gave the Commission direct authority to regulate the industry while proscribing clear limits on the agency's jurisdiction.

B. Telephone Deregulation

The Court again crossed swords with the agency in 1994, in response to the Commission's effort to deregulate parts of the telephone industry. Title II required each interstate telephone company to file tariffs with the Commission containing a list of the company's services and rates, which the Commission reviewed for reasonableness.²⁷ In 1934, tariffing helped prevent Bell Telephone from abusing its position as the nation's monopoly phone company.²⁸ But by 1994, an antitrust decree had broken up the Bell monopoly, and interstate long-distance telephone service was increasingly competitive.²⁹ The Commission found that, at least for those long-distance providers that lacked market power, competition would be sufficient to assure just and reasonable rates. Moreover, the tariff requirement placed a substantial burden on smaller and newer long-distance companies. So, exercising its authority to "modify" the tariff requirement upon good cause, the Commission excused long-distance companies from the tariff requirement if they lacked market power—essentially excusing all but AT&T (formerly Bell's long-distance division) from Title II's comprehensive rate regulation scheme.³⁰

The Court found that this attempt to deregulate long-distance communications lay beyond the Commission's authority. The Court explained that "modify" refers only to gradual or incremental change. Therefore as used in the statute, the word did not permit the wholesale abandonment of the tariff system that the Commission envisioned.³¹ The Court further explained that rate-filings are "the essential characteristic" of

²⁶ *Id.* at 706, 708.

²⁷ 47 U.S.C. § 203.

²⁸ See *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 221 (1994).

²⁹ *Id.* at 222.

³⁰ *Id.*; see 47 U.S.C. § 203(b)(2).

³¹ *MCI*, 512 U.S. at 222.

a regulated industry, and that “[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”³² Shortly thereafter, the D.C. Circuit struck down a similar effort by the Commission to instill competition into local telephone markets through mandatory unbundling.³³ The Commission labored under what it saw as an anachronistic statutory scheme for another two years, until Congress passed the 1996 Telecommunications Act, which ushered in many of the changes that the Commission had sought to adopt on its own.³⁴

C. Broadband Reregulation

The Commission has recently embarked upon another paradigm shift at the edge of its statutory authority, most notably by imposing net neutrality restrictions on broadband internet providers.³⁵ Net neutrality began as a list of four non-binding principles that the Commission circulated alongside its 2005 order deregulating broadband internet service over phone lines.³⁶ Yet when the Commission found that Comcast acted contrary to those principles, it imposed a duty of nondiscriminatory traffic management upon broadband providers and sanctioned Comcast for violating that duty.³⁷ As in *Midwest Video II*, the Commission acknowledged that it lacked authority to directly regulate the service at issue, but nonetheless imposed common-carriage-like duties upon providers pursuant to its Title I ancillary authority.³⁸

And as in *Midwest Video II*, the court vacated the Commission’s order because the agency lacked authority to regulate Comcast’s network

³² *Id.* at 231.

³³ See *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

³⁴ Telecommunications Act of 1996, Pub.L. 104-104.

³⁵ One could argue that the Commission’s current wave of reregulation preceded the Obama Administration. In the early 2000s, even as the Commission pursued a generally deregulatory policy, it adopted a series of regulations designed to increase government oversight in one area: the protection of children from indecent material over the airwaves. The centerpiece of this reregulatory effort was the adoption of a more stringent standard for indecency, a policy whose ultimate fate remains to be seen. See *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009) (upholding new policy under APA review but leaving open possibility of constitutional challenge). But in an action that fits the general model, the D.C. Circuit struck down the Commission’s efforts to impose V-chip technology on television manufacturers, because this complex new scheme lay beyond the scope of the agency’s Title I authority. See *Am. Lib. Ass’n v. FCC*, 406 F.3d 689 (2005).

³⁶ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 FCC Rcd. 14986 (2005); see generally Daniel A. Lyons, *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*, 86 NOTRE DAME L. REV. 101 (2011).

³⁷ Formal Complaint of Free Press and Public Knowledge, Memorandum Opinion and Order, 23 FCC Rcd. 13028 (2008).

³⁸ *Id.*

management practices.³⁹ The Court explained that the Commission cannot rely on Title I to develop a general framework for broadband regulation,⁴⁰ nor can it claim authority under Title I to enforce general statements of policy by Congress, which do not themselves grant authority to the agency.⁴¹ Rather, the court reiterated *Midwest Video II*'s holding that the Commission must show how the regulation of particular broadband network management practices is "reasonably ancillary" to the Commission's statutorily mandated responsibilities.⁴² After all, the court noted, "'administrative agencies may [act] only pursuant to authority delegated to them by Congress.'"⁴³ To permit the Commission general authority under Title I to regulate broadband networks would "virtually free the Commission from its congressional tether."⁴⁴ After rejecting the Commission's attempts to tie its rule to specific founts of statutory authority (most notably a claim that broad regulatory authority is required to execute a trivial reporting obligation), the Court vacated the order as beyond the Commission's jurisdiction.⁴⁵

II. THE CASE FOR JUDICIAL OVERSIGHT OF AGENCY JURISDICTIONAL CLAIMS

The *Comcast* court repeatedly emphasized the need to "tether" the Commission to its statutory mandate. This emphasis reflects a theme that runs throughout this line of cases: the agency cannot unilaterally rewrite telecommunications law, either by deviating significantly from what it sees as an obsolete statutory scheme or by claiming broad regulatory authority over services beyond its jurisdictional core. In each instance, the court curbed the Commission's ambitions and prevented it from developing a general common law of telecommunications unmoored from its statutory authority.

Yet this skepticism is in tension with the generally deferential thrust of administrative law since *Chevron*.⁴⁶ As Cass Sunstein has noted, *Chevron* has become "the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies."⁴⁷ Under *Chevron*'s familiar two-step process, the court first must determine whether the statute in question is clear or ambiguous.⁴⁸ If the

³⁹ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

⁴⁰ *Id.* at 651.

⁴¹ *Id.*

⁴² *Id.* at 652.

⁴³ *Id.* at 654 (quoting *Am. Lib. Ass'n*, 406 F.3d at 691).

⁴⁴ *Id.* at 655.

⁴⁵ *Id.*

⁴⁶ *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

⁴⁷ Cass R. Sunstein, *Chevron Step Zero*, 92 VIRGINIA L. REV. 187, 188 (2006).

⁴⁸ See *id.*

language is clear, the court must enforce Congress’s intent; if ambiguous, the Court must defer to any agency interpretation that is reasonable, on the theory that Congress intends agencies, not courts, to fill the gaps in statutes that the agencies administer.⁴⁹ Importantly, the *Chevron* doctrine does not explicitly distinguish between an agency’s resolution of policy questions clearly within the scope of its delegated authority, and agency conclusions regarding the boundary of that authority.⁵⁰

It should. The history discussed above, and the Commission’s ongoing efforts to regulate broadband, highlight the courts’ unease with deferring to an agency’s interpretation of the scope of its own power. These cases are a subset of what Cass Sunstein refers to as “*Chevron* Step Zero”: the incoherent body of law regarding when the *Chevron* doctrine should apply.⁵¹ While Sunstein and others are skeptical of these “step zero” inquiries, there are several reasons why courts should decline to give *Chevron* deference to agency jurisdictional claims.

A. *Chevron* and Congressional Intent

The Supreme Court has never directly addressed the question of whether *Chevron* should apply to agency jurisdictional claims. Justice Brennan has asserted that such deference is inappropriate when interpreting statutes that “confine the scope of [an agency’s] jurisdiction.”⁵² His argument hinges on the fact that *Chevron* applies only to statutes that Congress has “entrusted [the agency] to administer”⁵³—and agencies do not “administer” statutes that confine their jurisdiction.⁵⁴ Justice Scalia has disagreed, asserting that one cannot distinguish meaningfully between jurisdictional statutes and those that authorize an agency to administer authority entrusted to it.⁵⁵ This is consistent with his general view that *Chevron* deference should govern any interpretation of an agency’s organic statute that reflects the agency’s “authoritative” position.⁵⁶

While Justice Scalia is correct that the line between “jurisdictional” and “policy” questions is somewhat murky, his argument goes too far. As Ernest Gellhorn and Paul Verkuil have argued, *Chevron* deference stems primarily from Congressional intent: it applies only “as a consequence of statutory ambiguity, and then only if the reviewing court finds an implicit

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See generally *id.*

⁵² *Miss. Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354, 386 (Brennan, J., dissenting).

Justices Marshall and Blackmun joined Justice Brennan’s dissenting opinion.

⁵³ *Chevron*, 467 U.S. at 844.

⁵⁴ *Mississippi Power*, 487 U.S. at 386 (Brennan, J., dissenting).

⁵⁵ *Id.* at 380 (Scalia, J., concurring in the judgment). No other Justices joined Justice Scalia’s concurrence; the majority decided the case on other grounds.

⁵⁶ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

delegation of authority to the agency.”⁵⁷ Or in Sunstein’s words, “[c]ourts defer to agency interpretations of law when, and because, Congress has told them to do so.”⁵⁸

But with respect to jurisdictional claims, the very question *presented* is whether Congress intended the agency’s authority to extend as far as the agency seeks. For this reason, Gellhorn and Verkuil explain, *Chevron* cannot apply to “extension of an agency’s jurisdiction beyond its core powers.”⁵⁹ In such cases, “no implicit delegation of law-interpreting authority was granted to the agency” and therefore “deference to the agency’s judgment on jurisdictional issues cannot be traced to congressional intent.”⁶⁰ Moreover, “[t]he more significant the question and the more impact that expansion of the agency’s jurisdiction is likely to have, the greater the likelihood that Congress did not intend implicitly to delegate that determination to an agency.”⁶¹

While the Court has never held that *Chevron* is inapplicable to such questions, several cases support this conclusion. Perhaps most dramatically, the *Mead* Court⁶² held that *Chevron* applies only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”⁶³ *Mead* teaches that before deferring to an agency’s interpretation of a statute, the Court must first satisfy itself that Congress intended it to do so. In a similar vein, the *MCI* Court held that “modify” was not ambiguous in part because it was “unlikely” that Congress intended to delegate such broad authority in so “subtle” a fashion.⁶⁴ The Court reached the same conclusion in *Brown & Williamson*,⁶⁵ where the Court held that the Food, Drug, and Cosmetics Act did not grant the FDA jurisdiction over tobacco (despite broad statutory language that, textually, supported the agency’s claim) because it was unlikely that Congress intended to do so, in light of other tobacco statutes.⁶⁶

If Congressional intent is truly *Chevron*’s animating policy, then deferring to agency conclusions regarding its jurisdictional limits is somewhat illogical: it would imply that Congress intended the agency to determine what Congress intended. This circularity illustrates the distinction between jurisdictional claims and the more routine policy

⁵⁷ Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1007 (1999). (quoting *Sea-Land Serv., Inc. v. Dept. of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-44 (1984))).

⁵⁸ Sunstein, *supra* note 47, at 198.

⁵⁹ Gellhorn & Verkuil, *supra* note 57, at 1018.

⁶⁰ *Id.* at 1008.

⁶¹ *Id.*

⁶² 533 U.S. 218 (2001).

⁶³ *Id.* at 226-227.

⁶⁴ *MCI*, 512 U.S. at 231.

⁶⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

⁶⁶ *Id.* at 159.

questions that lie *Chevron's* core. Once the scope of an agency's jurisdiction is determined, it may be wholly appropriate to defer to the agency's efforts to fill gaps in the agency's organic statute, if indeed Congress intended the agency to make the rules necessary to carry out the statutory scheme. But such policy questions are different in kind from the question of where Congress intended the outer limits of the statute to be: before a court defers to an agency's conclusion as to how best to regulate a service, it should satisfy itself that Congress has, in fact, told it to do so, by independently determining whether the agency has jurisdiction over the service.

B. Nondelegation Concerns

Of course, one could argue that Congress did indeed intend the agency itself to determine the scope of its jurisdiction.⁶⁷ Telecommunications would seem to be a field where Congress would find "dynamic statutory interpretation" useful: technology changes so rapidly that Congress may intend the Commission to remain nimble and flexible, by allowing it to determine its own jurisdiction. But this self-defining jurisdictional scheme would run afoul of the principles underlying the nondelegation doctrine.

The nondelegation doctrine seeks to assure that basic, critical policy choices are decided by Congress, not agencies, by striking down statutes as unconstitutional that delegate the legislative power to another branch of government.⁶⁸ As the Court has explained, the doctrine "is rooted in the principle of separation of powers that underlies our system of government."⁶⁹ The Constitution vests Congress alone with the power to make laws, because of its unique position as an elected deliberative body. "The 'integrity and maintenance of that system of government ordained by the Constitution' mandate that Congress cannot delegate its legislative power to another branch."⁷⁰

But the nondelegation doctrine is animated by more than mere formalism: there are strong policy reasons why the legislative power should not be delegated to agencies. First, Congress is politically accountable in a way that agencies are not. While agencies are indirectly politically accountable, in the sense that they work for an elected president, this noisy signaling mechanism is not a substitute for the direct access that citizens

⁶⁷ See, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 251.

⁶⁸ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); Manning, *supra* note 67, at 238-39.

⁶⁹ *Mistretta*, 488 U.S. at 371.

⁷⁰ *Id.* at 371-72 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

have to their congressmen.⁷¹ Political accountability requires the legislative process to be more open to public inspection than rulemaking at many agencies. Moreover, legislation must go through the constitutionally-mandated process of bicameralism and presentment. By requiring a bill to pass both houses of Congress and the President before becoming effective, the legislative process divides the legislative power and makes it more difficult for particular interest groups to “capture” the rulemaking process for private gain.⁷² The process also encourages a measure of deliberation and restraint in rulemaking, assuring “that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”⁷³

These safeguards should seem particularly significant to students of telecommunications, as the FCC has a reputation for dysfunctional operation. As Phil Weiser has noted, the Commission has repeatedly been chastised for deciding major policy issues in private, with insufficient public deliberation.⁷⁴ It has also developed a reputation for being unduly influenced by special interests: Weiser notes that former Chairman Reed Hundt once suggested that FCC stood for “Firmly Captured by Corporations.”⁷⁵ The D.C. Circuit has repeatedly chastised the agency for relying heavily on ex parte proceedings rather than notice-and-comment rulemaking procedures, which permits well-connected special interests to wield undue influence over agency procedures.⁷⁶ “Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those ‘in the know’ is intolerable.”⁷⁷ Finally, the Commission has a long and well-earned reputation for ad-hoc decisionmaking rather than deliberate, reasoned strategic planning, a reputation that it is consciously trying to overcome.⁷⁸

Unfortunately, while the nondelegation doctrine has strong formal and functional rationales that would appeal to the Commission’s critics in particular, the Court has found the doctrine notoriously hard to enforce

⁷¹ As the Court noted in *Chevron*, this fact makes agencies more politically accountable than courts, which is one reason why courts should defer to their policymaking expertise. See *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

⁷² See Manning, *supra* note 68, at 239; *INS v. Chadha*, 462 US 919, 951 (1983) (discussing the “fear that special interests could be favored at the expense of public needs”).

⁷³ *Chadha*, 461 US at 951.

⁷⁴ Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 677 (2009); see *Home Box Office v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977) (chastising Commission’s secrecy as “inconsisten[t] ... with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law.”).

⁷⁵ Weiser, *supra* note 74, at 683-684. To the Commission’s credit, the National Broadband Plan proceeding seems self-consciously designed to bring a greater level of long-range planning and foresight to spectrum allocation.

⁷⁶ *Home Box Office*, 567 F.2d at 58.

⁷⁷ *Id.* at 54.

⁷⁸ Weiser, *supra* note 74, at 681.

directly.⁷⁹ As the *Mistretta* Court explained, “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁸⁰ Yet the Court refuses to abandon nondelegation principles altogether: it has been willing to use the nondelegation doctrine as a canon of statutory construction, to narrow the scope of a statute that would otherwise raise a serious nondelegation question.⁸¹ These tea leaves suggest the Court still takes seriously the principles underlying the nondelegation doctrine, even if it struggles to apply the doctrine itself to individual cases.

Midwest Video II, *MCI*, and *Comcast* all display strong nondelegation themes. In each decision, the Court is willing to scrutinize the agency’s jurisdictional claims closely, in part because of a concern that the agency’s interpretation would result in an unlikely or uncomfortably broad delegation of authority. In *Midwest Video*, for example, the Court emphasized that “[t]hough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority” under the Act.⁸² The Court also acknowledged that its prior cable-related decisions only “cautiously”⁸³ recognized the Commission’s efforts to regulate cable and stressed that those regulations “strain[ed] the outer limits” of its jurisdiction.⁸⁴ The Court found that the Commission’s proposed cable common carriage duties were inconsistent with the spirit of Section 3(h) of the Act, which sought to respect the editorial discretion of over-the-air broadcasters.⁸⁵ Importantly, the Court rejected the Commission’s assertion that Section 3(h) applied only to broadcasters, and imposed no limitations on cable companies: “without reference to the provisions of the Act directly governing broadcasting, the Commission’s [ancillary] jurisdiction...would be unbounded.”⁸⁶ In the process, the court rejected the agency’s broad interpretation of an ambiguous statutory phrase, and instead interpreted the statute in a way that avoided an unlimited delegation of authority over cable.

The *MCI* Court was also concerned that the agency’s interpretation of the Act would delegate the agency unchecked authority. Ostensibly, the Court applied the *Chevron* framework and resolved the case at *Chevron* Step One: the majority found that the statute’s grant of authority to “modify” the tariff requirement unambiguously permitted only minor

⁷⁹ Only twice has the Court found a statute so lacking in guidance as to be an unconstitutional delegation of authority, both in 1935.

⁸⁰ *Mistretta*, 488 U.S. at 372.

⁸¹ See *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

⁸² *Midwest Video II*, 440 U.S. at 706.

⁸³ *Id.* at 708.

⁸⁴ *Id.* at 699.

⁸⁵ *Id.* at 706.

⁸⁶ *Id.* at 706.

changes, and that the Commission's attempt to free non-dominant providers from the requirement completely thus exceeded the agency's power.⁸⁷ But as the dissent notes, permission to "modify...any requirement" seems fairly open-ended, and at least one contemporaneous dictionary definition of the word is susceptible to the Commission's interpretation.⁸⁸ Elsewhere in the opinion, the majority admitted that other factors colored its analysis. In particular, the Court noted that tariff filings are, "in fact, the essential characteristic of a rate-regulated industry."⁸⁹ Therefore while determining whether the Commission's action constituted a "modification" of the tariff requirement or something more, the Court was "[b]earing in mind [] the enormous importance to the statutory scheme of the tariff-filing provision."⁹⁰ The Court found that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."⁹¹ And it is "even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."⁹² The Court rejected the Commission's interpretation of the statute in part because it did not believe Congress implicitly delegated the Commission this much lawmaking power.

Comcast reflects both *Midwest Video*'s discomfort with broad claims of agency authority and *MCI*'s skepticism that Congress intended such a broad delegation of authority through subtle, vague language. First, the Court rejected the Commission's claim to an unbounded general power to regulate broadband service under Title I: a finding that "the Commission's ancillary authority may allow it to impose *some* kinds of obligations on cable Internet providers" cannot support "a claim of plenary authority over such providers."⁹³ Similarly, the Court rejected the Commission's claim that general statements of congressional policy were sufficient to support the Commission's jurisdiction over broadband, because these statements are not delegations of regulatory authority. Extending the Commission's ancillary authority based upon such broad, nonbinding statements "would virtually free the Commission from its congressional tether."⁹⁴ If accepted, the Commission would be free to enact the same requirements on internet service providers that the Commission places on telephone service, broadcasting, or cable services, without any direction from Congress to do so. The Court explained that if *Midwest Video II*

⁸⁷ *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 228-29 (1994).

⁸⁸ *Id.* at 241-42 (Stevens, J., dissenting).

⁸⁹ *Id.* at 231.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Comcast Corp. v. FCC*, 600 F.3d 642, 650 (D.C. Cir. 2010).

⁹⁴ *Id.* at 655.

exceeded the outer limits of the Commission's jurisdiction, this claim "seeks to shatter them entirely."⁹⁵

When pressed, the Commission offered a series of specific statutory duties to which its claimed authority over broadband might attach, but the Court rejected each in turn. Perhaps most notably, the Commission claimed that regulation of Comcast's network management practices was reasonably ancillary to its duty under Section 257 to report to Congress every three years on potential barriers preventing small business owners from entering the market for telecommunications or information services.⁹⁶ The Court conceded that Comcast's network management practices may be relevant to such a report.⁹⁷ But channeling *MCI*, the court found that "the Commission's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of 'ancillariness.'"⁹⁸

In each case, the Court rejected the Commission's broad assertion of jurisdiction at least in part because of nondelegation-flavored concerns about boundless agency regulatory authority. Although complainants did not raise a nondelegation challenge, and the Court has famously upheld the Communications Act's charge to regulate in the "public interest" as a sufficiently intelligible principle,⁹⁹ both *Midwest Video* and *Comcast* express concern that the agency must remain tethered to specific statutory directives rather than be permitted the broad authority of a roaming telecommunications lawgiver. And both *MCI* and *Comcast* recognize that in practice, Congress is unlikely to delegate such broad authority to the Commission *sub silentio*. In this sense, the Court's skepticism toward the Commission's jurisdictional claims reflects a shade of Sunstein's observation that the nondelegation doctrine is "alive and well" and has been "relocated rather than abandoned" as "a series of more specific, and smaller, though quite important, nondelegation doctrines."¹⁰⁰ Given the important constitutional and policy provisions underpinning the doctrine, this skepticism about agency claims to broad jurisdiction is both expected and welcome, even against the backdrop of a general deference toward agency interpretations of its organic statute.

⁹⁵ *Id.*

⁹⁶ *Id.* a 659.

⁹⁷ *Id.*

⁹⁸ *Id.* at 659-60.

⁹⁹ See *NBC v. United States*, 319 U.S. 190 (1943); but see Randolph May, *The Public Interest Standard: Is It Too Indeterminate to be Constitutional?*, 53 FED. COMM. L.J. 427 (2001).

¹⁰⁰ Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315-16 (2000).

C. Institutional Competence

Elizabeth Foote highlights another reason why courts should differentiate between jurisdictional and policymaking questions. Foote notes that agencies and courts are fundamentally different institutions, with institutional strengths and weaknesses tailored toward performing different functions. Courts are dispassionate and neutral arbiters of the law, designed to carefully weigh both sides of a legal argument and decide impartially what the law is. By comparison, agencies are public bureaucracies charged with “carrying out” Congress’s statutory schemes.¹⁰¹ Unlike courts, agencies perform an “operational, policy-implementing role” by “choosing from among a variety of possible solutions to a particular set of specialized problems or challenges.”¹⁰² When doing so, agencies do not mimic the court’s dispassionate neutrality when divining Congress’s intent in a particular case. On the contrary, agencies act with a particular (often politically-motivated) goal in mind, rely on their own expert judgments, and remain cognizant of accountability to the political branches.¹⁰³ Agency alchemy synthesizes “law, politics, experience, and management”¹⁰⁴ into a policy prescription in a way that courts could not, and should not, attempt to imitate.

Looking at each institution’s comparative strengths, courts are better positioned to answer the legal question of where Congress set the boundary of an agency’s jurisdiction.¹⁰⁵ The Administrative Procedure Act expressly instructs courts to “decide all relevant questions of law” and “interpret...statutory provisions,” and further instructs reviewing courts to “hold unlawful and set aside agency action” found to be “in excess of statutory jurisdiction.”¹⁰⁶ Defining the jurisdictional limits of an agency’s organic statute is a quintessential legal question, involving the use of traditional tools of statutory interpretation to find fixed meaning in a statutory text.¹⁰⁷ Deferring to the agency’s own conclusion regarding its jurisdiction replaces his dispassionate legal analysis with a process that is consciously “mission oriented and politically directed.”¹⁰⁸ Such deference is wholly appropriate when determining which of two legitimate policy objectives the agency should adopt; but it is misplaced when applied to more basic legal questions of the scope of an agency’s authority.

¹⁰¹ Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 679 (2007).

¹⁰² *Id.*

¹⁰³ *Id.* at 692-93.

¹⁰⁴ *Id.* at 684.

¹⁰⁵ *Id.* at 712.

¹⁰⁶ 5 U.S.C. § 706.

¹⁰⁷ Foote, *supra* note 101, at 713.

¹⁰⁸ *Id.* at 712.

D. The Political Accountability of Independent Agencies

Finally, courts may view the jurisdictional claims of independent agencies such as the Commission with particular skepticism, because independent agencies are less politically accountable. As Randolph May has noted,¹⁰⁹ the *Chevron* Court was motivated in part by the fact that “federal judges—who have no constituency—have a duty to respect the legitimate policy choices made by those who do.”¹¹⁰ This political accountability rationale appears often in both cases and academic literature discussing *Chevron*: Justice Kagan, for example, has noted the rise in presidential involvement in the daily operations of executive agencies, and has suggested that *Chevron* deference be “link[ed]” to such presidential involvement to encourage greater political “control as mitigating the potential threat that administrative discretion poses.”¹¹¹ This logic suggests that courts should be less deferential to the conclusions drawn by independent agencies, which are structurally designed to be insulated from executive political control—a fact that both Kagan and May acknowledge.¹¹²

This lack of political accountability weighs especially strongly in the context of jurisdictional questions. The Progressive-Era Congresses shielded the FCC and other independent agencies from political influence so they could bring their professional expertise to bear on important questions without fear of being corrupted by politics. Of course, no question is more important to an agency than the scope of its ultimate power—and when deciding such questions, an agency is susceptible to corruption of a different sort, the temptation to maximize influence and aggrandize power. *Chevron* limits the Court’s ability to rein in wayward agencies that succumb to this natural temptation. As Justice Kagan notes, this is not a fatal flaw in most cases, because a strong president will discipline agencies that overreach in ways that generate a political backlash.¹¹³ But the president’s power over independent agencies has been intentionally blunted—which suggests the need for a less deferential jurisprudence that would allow the Court to fill the void.

¹⁰⁹ See Randolph May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429 (2006); Randolph May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433 (2010).

¹¹⁰ *Chevron*, 467 U.S. at 866.

¹¹¹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001); *id.* at 2369.

¹¹² *Id.* at 2376; May, *Defining Deference Down*, *supra* note 109, at 441.

¹¹³ See Kagan, *supra* note 111, at 2363.

III. DECIDING AGENCY JURISDICTIONAL QUESTIONS

A. Distinguishing Jurisdictional from Policy Questions

Cass Sunstein makes two related objections to so-called “*Chevron* Step Zero” inquiries such as the one suggested here. First, Sunstein notes that agencies are policymakers at heart, and the determination of the limits of an agency’s statute is itself a policy choice.¹¹⁴ But this is only partly true. At the agency level, the legal question whether the Commission can (for example) enact rules governing broadband network management is inextricably intertwined with the policy question of whether such rules are necessary and if so, what they should be. But they are distinct questions, and as Foote notes, the fact that agencies are policymakers is the very reason why we should not trust them to make legal questions. Agency expertise is clearly relevant to the policy question of whether and how the agency’s jurisdiction should be expanded. But the agency’s answer to the ostensibly legal question of whether it has authority to act will inevitably be colored by its policy judgment that action is necessary.

Sunstein also notes that distinguishing between questions of agency jurisdiction and more routine policy questions is too difficult to administrate in practice.¹¹⁵ This objection is reminiscent of Justice Scalia’s observation that it is hard to differentiate between the question of whether an agency can regulate a service and whether the agency’s choice among policy alternatives is permissible.¹¹⁶ Admittedly, courts may find it difficult to decide at the margin whether (for example) the question presented in *MCI* is best understood as a legal question of the agency’s jurisdiction to act, or a policy question whether deregulation is appropriate, particularly given that *Chevron* does not carefully distinguish between the two. Ultimately, however, the fact that a legal inquiry is hard should not alone constitute a reason to abandon it. There is no reason why distinguishing between jurisdictional and policy questions presents any more difficult a challenge for the judiciary than ascertaining whether a particular action is an “unreasonable search” or any other difficult constitutional standard. The “hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power”¹¹⁷ is no less prevalent in administrative agencies, and both constitutional and policy concerns demand that this pressure “be resisted.”¹¹⁸

And while it may be challenging to identify jurisdictional questions that lay beyond *Chevron*’s scope, the *Mead* Court suggests both the need

¹¹⁴ Sunstein, *supra* note 47, at 246.

¹¹⁵ *Id.*

¹¹⁶ *Miss. Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354, 380 (Scalia, J., concurring).

¹¹⁷ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

¹¹⁸ *Id.*

and the pathway to do so. In any given case involving a statutory interpretation question, the Court should ask whether the issue presents a question as to the agency's jurisdiction. But this inquiry is simply one species of the broader inquiry that *Mead* demands of all such cases: before the Court defers to the agency's interpretation, how can it be sure that Congress meant for the agency to issue rules on this topic that carry the force of law?¹¹⁹

Naturally, the most obvious indication of congressional intent is the statute itself: do the words Congress chose indicate clearly that it intends agency jurisdiction to extend to the subject at issue? The clearer and more specific Congress's jurisdictional grant is, the easier it is to conclude that it intended the agency to issue rules on the topic with the force of law. But where, as is typical, the statute is unclear or broad, the Court must draw upon other tools of statutory interpretation. Such tools could include the larger context in which the specific jurisdictional grant appears, the purpose of the statute as a whole, or perhaps the statute's legislative history.

MCI suggests that the Court should also look at the "importance" of the agency's proposed course of action, compared to the statute from which the agency claims its jurisdiction. The more significant or monumental the agency's action is, the more evidence the Court should require that Congress meant the agency to act in this sphere. Tariff filings were an integral feature of Title II, without which the Commission's ability to regulate rates would be eviscerated. The Court simply did not believe that Congress gave the agency discretion to eliminate the carefully-designed rate regulation regime through so benign a word as "modify."¹²⁰ Similarly, the *Brown & Williamson* Court recognized that tobacco is a significant and controversial industry whose regulation presents many politically-charged questions. It therefore rejected the agency's claim that tobacco fell under the FDCA's jurisdictional grant, even though the statutory language could have been read as doing so.¹²¹

Finally, as Gellhorn and Verkuil note, one way to determine whether the agency's proposed regulation presents a jurisdictional question is how far the regulation strays from the agency's "core regulatory assignment."¹²² If an agency has not previously regulated the product or service, or asserted jurisdiction to do so, Congressional intent to regulate is less likely the less the product or service resembles those things that the agency does regulate. The more the agency strays from its jurisdictional core, the more evidence is required before concluding that Congress intended the agency to reach as far as it seeks to.

¹¹⁹ *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

¹²⁰ *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 (1994).

¹²¹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

¹²² Gellhorn & Verkuil, *supra* note 57, at 1011.

One may object that the formulation above does not present a “Chevron Step Zero” inquiry, but instead simply suggests the need for a robust inquiry at Step One: the Court should use all the tools of statutory construction at its disposal before concluding that Congress has not directly spoken to the issue and proceeding to Step Two.¹²³ In most cases, the distinction may seem semantic. But there is a conceptual difference between the question whether Congress intended the agency to regulate a service at all, and whether Congress provided a clear rule or a free hand in the regulation of that service. Practically, the difference lies in the case of silence: if Congress has not spoken as to whether the agency may regulate a service, the nondelegation doctrine suggests the presumption should be that the agency lacks jurisdiction to do so. Whereas if Congress has given the agency jurisdiction over a service but has been silent regarding how it should do so, *Chevron* suggests the presumption should be that Congress intended the agency to fill this gap.

B. Skidmore and the Jurisdictional Inquiry

Of course, while the agency’s jurisdictional claims do not warrant *Chevron* deference, this does not “place [the agency’s action] outside the pale of any deference whatsoever.”¹²⁴ Under *Skidmore v. Swift & Co.*,¹²⁵ “an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency.”¹²⁶ “The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”¹²⁷

The agency remains an expert in the administration of its organic statute, and its views regarding the breadth of the statute and its extension to the service in question may warrant some deference. *Skidmore* allows the court to take these views into account, but without mechanically giving this opinion the substantial deference owed under *Chevron*. *Skidmore* allows the Court to determine the extent to which the agency’s views are a product of its expertise, and to discount those views to the extent they reflect the agency’s self-interest in aggrandizing power to itself. It also allows the court to determine independently the extent to which the agency’s legal conclusion regarding its jurisdiction is colored by its policy conclusion that regulation is necessary or beneficial to society.

¹²³ Cf. Sunstein, *supra* note 47, at 229.

¹²⁴ *Mead*, 533 U.S. at 234.

¹²⁵ 323 U.S. 134 (1944).

¹²⁶ *Mead*, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139).

¹²⁷ *Id.* at 228.

C. Applying the Framework to the Commission's Proposed Broadband Rules

The above framework yields important insights as the Commission turns its attention to the next phase in telecommunications regulation. First and foremost, courts should continue to recognize that the Commission remains the nation's foremost authority on telecommunications and should continue to defer to reasonable policy decisions that are clearly within the scope of the agency's authority. Yet courts should not be afraid to scrutinize agency claims of statutory authority that expand the scope of the agency's jurisdiction or that effect dramatic departures from a congressionally mandated regulatory scheme. The court ultimately may find that such expansion is permissible under the Act, but constitutional and institutional concerns demand that this scrutiny be performed without *Chevron's* customary thumb on the scale of agency deference.

More specifically, the D.C. Circuit was correct to scrutinize the Commission's attempt to regulate Comcast's network management practices. The agency claimed near-plenary authority to regulate broadband providers under Title I and under general statements of Congressional policy. But while Title I generally gives the FCC jurisdiction over "communication by wire or radio," a statutory grant that would seem to encompass broadband service, this broad interpretation is inconsistent with the structure of the Act as a whole. Titles II, III, and VI, governing telecommunications service, broadcasting, and cable, respectively, each represent a complex, meticulously designed regulatory scheme governing the service in question. A plenary power over other communication by wire or radio is inconsistent with these schemes, which is why courts have required the FCC to tie its Title I authority to a specific grant of authority within its jurisdictional core. Given the Internet's prominence, the Court was correct to conclude that Congress did not intend the agency to exercise substantial regulatory authority under Title I sub silentio through general statements of policy or through an innocuous monitoring and reporting requirement.

Nor should the level of scrutiny change if the Commission instead revives its earlier plan to reclassify the transmission component of broadband service as a Title II service. Pundits and the Commission itself have put forth this possibility as a way to escape the close scrutiny of *Comcast*. But the Commission has not historically regulated broadband service under Title II, and in fact has defended the proposition before the Supreme Court that broadband service is an unregulated "information service" rather than a Title II "telecommunications service."¹²⁸ While the

¹²⁸ Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

transmission component of broadband service may fit within the statute's definition of "telecommunications",¹²⁹ there is ample evidence from the statute that the service does not fit well into Title II. Reclassifying broadband under Title II would subject broadband providers to a host of regulations that were clearly written for telephone companies and would be irrelevant at best (and possibly harmful) to the broadband industry. As in *MCI*, the fact that most of Title II clearly pertains to telephones suggests that it is "unlikely" that Congress intended its Title II delegation to cover internet access as well. The Commission's claims run afoul of the deregulatory emphasis of the 1996 Telecommunications Act generally and Section 230 in particular, which emphasizes Congress's desire that the Internet remain free of regulation.

The Commission has suggested it could solve this problem by exercising its forbearance authority to relieve broadband providers from those portions of Title II that would be inappropriate to enforce against the industry. But the use of forbearance to whittle a comprehensive telephone regulatory scheme into a custom-fit law of the Internet suggests that the Commission is venturing dangerously close to the type of unbounded regulatory authority that the *Midwest Video* and *Comcast* courts rightly feared. The Commission may be correct that broadband transmission resembles telephone service, and its expertise may be entitled to some deference under *Skidmore*; but the overwhelming statutory evidence suggests that Congress has not (yet) intended to give the agency general regulatory authority over broadband, no matter how much (as a policy matter) the Commission feels it needs this authority. It would be a mistake to defer to the agency's conclusion otherwise under a misappropriation of the *Chevron* doctrine.

IV. JUDICIAL OVERSIGHT AND THE VIRTUOUS CIRCLE

A careful study of the aftermath of *Midwest Video* and *MCI* suggest yet another reason to favor close judicial scrutiny of agency jurisdictional claims: this judicial oversight facilitates a more active dialogue between the agency and Congress, assuring that all three branches of government play a part in the modernization of telecommunications law.

As discussed above, the Commission initially lacked direct jurisdiction over cable, and became interested in regulating this new industry when its growth began to threaten the interests of broadcasters. Tom Hazlett has argued that because broadcasters had considerable

¹²⁹ The Communications Act defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." It defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public," 47 U.S.C. 153.

influence at the FCC, the Commission's early cable efforts were designed not to facilitate the introduction of a revolutionary new telecommunications service, but to protect the incumbent broadcasters from disruptive competition.¹³⁰ The Commission adopted restrictions on cable providers' ability to import out-of-market signals to compete against local broadcasters; it experimented with requirements that cable companies carry all broadcast stations in a local market; and it developed, then scuttled, a comprehensive set of programming restrictions limiting cable operators' ability to show first-run feature films and sporting events.¹³¹ The Commission's actions signaled that the growth of the cable industry was impacting the broadcasting ecosystem, and therefore some amount of agency oversight was necessary. But the Commission's reaction was typically ad hoc and failed to represent a comprehensive scheme for industry regulation. Congress failed to get involved, perhaps due to a vague sense that the Commission was adequately managing the new threat. Yet the haphazard nature of the Commission's cable regulations, coupled with the lack of a more comprehensive regulatory scheme, left the industry in an "ill-defined state of regulatory uncertainty" that stifled investment and competition.¹³²

Meanwhile, *Southwestern Cable* and *Midwest Video I* suggested that there would be a limit to the agency's ad hoc regulation of cable under its ancillary authority. When the Court struck down the Commission's common carriage rule in *Midwest Video II*, I sent an unmistakable signal to Congress that the need for cable regulation outstripped the Commission's authority, and therefore comprehensive regulatory reform was necessary. Shortly thereafter, Congress passed the 1984 Cable Act, which gave the Commission direct authority to regulate cable and a comprehensive regulatory scheme to guide these regulations. Notably, this regulatory scheme was reminiscent of the Commission's earlier ad hoc efforts, but it differed in several key ways. For example, it adopted a limited must-carry rule similar to that upheld in *Midwest Video I*, and it included certain public access requirements, but nothing as onerous as the scheme rejected in *Midwest Video II*, and contained few cable content restrictions. More generally, the Cable Act replaced ad hoc regulation to protect the special interests of broadcasters with a comprehensive regulatory scheme that reflected input from a wide swath of interested parties. The result was a more stable, predictable regulatory environment than the FCC had achieved on its own, an environment that fostered exponential growth and development in the two decades that followed.

¹³⁰ See Lyons, *supra* note 11, at 391-392.

¹³¹ *Id.*; see, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 25 (D.C. Cir. 1977).

¹³² *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 767 (6th Cir. 2008).

One can tell a similar story about telephone deregulation. As discussed above, historically the Commission's telephone policies had been shaped primarily by a set of rules written in 1934 to restrain Bell, which had a state-granted monopoly over both local and long-distance service on the theory that telephone service was a natural monopoly.¹³³ But this statutory language was ill-suited to govern the competitive telephone market that had emerged by the late 1980s.¹³⁴ Frustrated by the mismatch between its statutory mandate and the reality of the modern telephone landscape, the Commission adopted new rules that it felt were more amenable to an increasingly competitive industry, such as relieving new competitors from the burdens of filing tariffs, and requiring legacy local telephone companies to make their facilities available on an unbundled basis to new local competitors.¹³⁵

As in the cable context, these increasingly drastic measures signaled the Commission's concern that its old practices were ill-suited to the modern landscape and needed change. When the Court struck down the long-distance regulations in 1994, and the D.C. Circuit struck down the Commission's local competition regulations shortly thereafter, the Court signaled its own concern that the Commission could not rewrite the law of the telephone without the oversight and guidance of Congress. A scant two years later, Congress passed the 1996 Telecommunications Act, which replaced the old monopoly regulations with a managed competition regime, gave the Commission the flexibility it needed to tailor regulatory requirements to particular market players, and set the stage for explosive growth in telephone and other telecommunications services since.

In both cases, close judicial review played an important role in prompting Congress to action. By enacting rules at the periphery of its statutory authority governing cable and deregulating the telephone industry, the Commission signals the need to expand its regulatory operations in response to a dynamic marketplace. When the Court struck down the agency's rules as beyond its jurisdiction, the act in no way diminished the importance of the Commission's initial signal. If anything, the high-profile nature of each case amplified the Commission's cry for action, and augmented it with its own prompt for Congress to get involved. In response, Congress passed comprehensive reform that took its cues from the Commission's initial efforts but ultimately yielded a more thoughtful and inclusive solution than that which the Commission developed itself.

Ideally, the Commission's current efforts to regulate broadband will proceed as its earlier cable and telephone projects did. The Commission is unquestionably correct that the internet is the telecommunications network

¹³³ See Lyons, *supra* note 11, at 387-388.

¹³⁴ See *MCI Telecomm. Corp. v. A&T*, 512 U.S. 218, 220-221.

¹³⁵ See *id.*; see also *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

of the 21st century. If Congress continues to believe that the Commission should play a role in regulating telecommunications networks, the Commission needs some jurisdiction to regulate broadband networks, as the Commission's Comcast order suggests. The Court's reaction signaled to Congress the absence of such jurisdiction under the current act, and the need for a statutory mandate to govern internet regulation. A clear statutory mandate would provide the Commission with a comprehensive regulatory scheme that reflects input from all interested parties, rather than the select few who have the Commission's ear. It would then permit the Commission to draft policy rules tethered to a direct fount of authority and guided by clear intelligible congressional principles.

CONCLUSION

The Federal Communications Commission unquestionably remains the nation's foremost authority on telecommunications regulation, and per *Chevron*, courts should continue to defer to policy judgments clearly within the scope of the agency's jurisdiction. But both the nondelegation doctrine and the policies underlying *Chevron* require that the Commission's actions always be firmly tethered to a direct grant of authority from Congress. It is the judiciary's institutional role, and its constitutional duty, to assure that any agency jurisdictional claim satisfies this test. The hydraulic pressure of each branch of government to exceed the outer limits of its power is no less strong within agencies than in other areas of government, and must be patrolled just as carefully. Careful judicial review of such claims is necessary to assure that the Commission stays within its statutorily-authorized boundary, and to prod Congress to action in the event that the Commission sees the need for regulation of additional services outside the scope of its current authority.